

**Batash v Zarkadas**

2021 NY Slip Op 32809(U)

December 22, 2021

Supreme Court, New York County

Docket Number: Index No. 654500/2020

Judge: Louis L. Nock

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. LOUIS L. NOCK **PART** **38M**

*Justice*

-----X

JON BATASH,

Plaintiff,

- v -

KONSTANTINOS ZARKADAS, EMMA ZARKADAS,  
MONIKA MAIELLANO, ANISH BERRY, and KRYOMED LI,  
LLC,

Defendants.

-----X

**INDEX NO.** 654500/2020

**MOTION DATE** 10/28/2020,  
10/30/2020,  
02/16/2021

**MOTION SEQ. NO.** 001 002 004

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 26, 28, 30, 31, 34, 35, 36, 37, 38, 39, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 117, 159

were read on this motion for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 29, 32, 33, 40, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 158, 167

were read on this motion for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 160, 161, 162, 163, 164, 165, 166

were read on this motion to CHANGE VENUE.

LOUIS L. NOCK, J.

Upon the foregoing documents, and after argument, it is determined as follows.

WHEREAS this court was informed at argument that the motions to dismiss – sequence numbers 001 and 002 – are withdrawn, said motions are hereby denied as moot.<sup>1</sup>

As for motion sequence number 004, defendants move for an order, pursuant to CPLR 510, to change venue to Nassau County. Plaintiff commenced this action in New York County,

<sup>1</sup> Motion sequence number 003 had also been withdrawn, previously (*see*, NYSCEF Doc. No. 135).

even though the contract upon which Plaintiff's claim is predicated (and which contract Plaintiff attached as an exhibit to his Complaint), clearly provides that venue for all disputes is fixed in Nassau County (*see*, NYSCEF Doc. No. 3). As such, venue based on contract provisions would require the action to be removed to Nassau County Supreme Court.

Furthermore, Plaintiff commenced this action in New York County, even though: (a) none of the events or activities described in the Complaint took place in New York County; (b) Plaintiff resides in Queens County; and (c) all of the defendants reside and/or are domiciled in Nassau County. As such, venue based on residence is not appropriate in New York County (*see*, CPLR § 503).

Defendants had informally requested, and thereafter, formally demanded from Plaintiff's counsel a change of venue to Nassau County pursuant to CPLR 511 (b); but that request and demand was refused.

Referring back to the ground based on contractual venue selection: the subject Membership Purchase Agreement (NYSCEF Doc. No. 3) provides, at § 7.3 thereof, as follows:

Except in respect of any action commenced by a third party in another jurisdiction, the parties hereto agree that any legal suit, action, or proceeding against them arising out of or relating to this Agreement shall be brought exclusively in the United States Federal Courts or Nassau County Supreme Court, in the State of New York. The parties hereto hereby accept the jurisdictions of such courts for the purpose of any such action or proceeding and agree that venue for any action or proceeding brought in the State of New York **shall lie in the Eastern District of New York or Supreme Court, Nassau County**, as the case may be.

(Emphasis added.)

Notwithstanding the contract provision fixing venue, Plaintiff commenced the action in New York County. As the First department has recently stated in a similar matter, “[s]ince this action arises out of or relates to the duties and obligations under the agreement, the venue-selection

clause applies, and defendant's motion [to change venue] should have been granted” (*Medina v Gold Crest Care Ctr., Inc.*, 117 AD3d 633, 634 [1st Dept 2014]).

Plaintiff attempts to downplay the significance of the parties’ explicit venue selection clause by stating that the complaint’s allegations of fraud ought to render the entire contract unenforceable, including its venue selection clause. But that argument is patently deficient for several reasons. First, the contract contains an express severability clause (section 7.1) which preserves the agreement’s enforceability except to the extent that particular provisions within the agreement are deemed unenforceable. Second, the allegations of fraud are not directed at the venue clause itself (*see, British West Indies Guaranty Trust Co., Ltd. v Banque Internationale a Luxembourg*, 172 AD2d 234 [1<sup>st</sup> Dept 1991]). Third, if venue selection clauses could be vitiated through the simple expedient of an allegation of fraud, they could never provide the type of commercial stability that parties to contracts rely on when negotiating such clauses.

However, regardless of the venue selection clause, this court has already observed above that this action has no nexus to New York County, seeing as none of the events or activities described in the Complaint took place in New York County; Plaintiff resides in Queens County; and all of the defendants reside and/or are domiciled in Nassau County.<sup>2</sup>

Accordingly, it is

ORDERED that the defendants’ motion for a change of venue is granted, and venue of this action is changed from this Court to the Supreme Court, County of Nassau; and it is further

---

<sup>2</sup> Insofar as motion sequence numbers 001 and 002 included cross-motions by the Plaintiff for amendment of the complaint, Plaintiff may reinstitute such applications before Supreme Court, Nassau County, which will now serve as the venue of this action.

ORDERED that the Clerk of this Court shall transfer the file in this action to the Clerk of the Supreme Court, County of Nassau and shall mark his records to reflect such transfer; and it is further

ORDERED that, within 30 days from entry of this order, counsel for movant shall serve a copy of this order with notice of entry upon the Clerk of this Court, shall pay the appropriate transfer fee, if any, and shall contact the staff of the Clerk of this Court and cooperate in effectuating the transfer; and it is further

ORDERED that the Clerk of the Court shall coordinate the transfer of the file in this action with the Clerk of the Supreme Court, Nassau County, so as to ensure an efficient transfer and minimize insofar as practical the reproduction of documents, including with regard to any documents that may be in digital format; and it is further

ORDERED that such service upon the Clerk of this Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

This will constitute the decision and order of the court.

ENTER:



<u>12/22/2021</u> DATE					<u>LOUIS NOCK, J.S.C.</u>
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:		SETTLE ORDER		<input checked="" type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input checked="" type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	REFERENCE
				<input type="checkbox"/>	FIDUCIARY APPOINTMENT